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Show-Cause Showdown: A Circuit Split in Applying the Affordable Care Act to Miners

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SHOW-CAUSE SHOWDOWN: A CIRCUIT SPLIT IN APPLYING THE AFFORDABLE CARE ACT TO MINERS

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INTRODUCTION: THE STORY BEHIND THE SHOWDOWN

Thousands of miners go beneath the ground every day in the hope of making a living for their families despite the dangers posed by inadequate mine ventilation, cave-ins, and possible explosions from the methane gases in the air.[1] While cave-ins and explosions are catastrophic events, usually resulting in miner deaths, pneumoconiosis, commonly known as "black lung," is a far more common but underestimated result of working in the mines. Sadly, this disease results from "prolonged breathing of coal dust," which miners cannot easily prevent due to their line of work.[2] Pat McGinley, who writes on black lung disease in the *Journal of Environmental and Sustainability Law*, describes these dire conditions in his criticism of coalmine regulation:

> Exposure to respirable coalmine dust can cause lung diseases including coal workers' pneumoconiosis (CWP), emphysema, silicosis, and chronic bronchitis, known collectively as "black lung." These diseases are debilitating, incurable, and can result in disability, and premature death.[3]

Workers throughout the country risked their lives for years going underground in these unregulated mines. After World War II, there was a consensus that something had to be done. In the wake of the Farmington,

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[1] *Safety Issues*, WORLD COAL ASS'N, http://www.worldcoal.org/coal-society/safety-issues/ (last visited Dec. 29, 2013).

[2] *Health and Safety on the Job*, UNITED MINE WORKERS OF AM., http://www.umwa.org/?q=content/black-lung (last visited Dec. 29, 2013).

[3] Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. ENVTL. & SUSTAINABILITY L. 305, 321 (2013).

West Virginia mine disaster in 1968, pressure for reform and protection had reached the White House. President Johnson recommended a legislative change to address these problems before the end of his presidential term.[4] After taking office, President Nixon reiterated the concern of his predecessor:

> The workers in the coal mining industry and their families have too long endured the constant threat and often sudden reality of disaster, disease, and death. This great industry has strengthened our Nation with raw material of power. But it has also frequently saddened our Nation with news of crippled men, grieving widows, and fatherless children.[5]

Congress took note of these comments and the growing social pressure, deciding to pass the Federal Coal Mine Health and Safety Act of 1969, recognizing pneumoconiosis as an occupational, compensable disease, while legalizing the term "black lung" as a synonym of this disease.[6] The Coal Mine Act of 1969 would come to be amended multiple times, most recently in 2010 with the Patient Protection and Affordable Care Act, commonly known as the Affordable Care Act (ACA), or Obamacare.[7] The standard by which miners and their families would be required to prove the effects of pneumoconiosis in order to obtain health benefits under the latest amendments in the Affordable Care Act is where a "fledgling circuit split" has occurred, as described by the Eleventh Circuit.[8]

Prior to passage of the Affordable Care Act in 2010, Congress had lax requirements for receiving benefits under the Federal Coal Mine Health and Safety Act of 1969.[9] For victims—and their families—raising black lung claims against the coal mining industry, this was a lifeline to benefits, compensating miners for their health problems. This came to a screeching

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[4] PETER S. BARTH, THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE 13 (1987).

[5] Special Message to the Congress on Coal Mine Safety 96 PUB. PAPERS 177 (Mar. 3, 1969).

[6] UNITED MINE WORKERS OF AM., *supra* note 2.

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[8] U.S. Steel Min. Co., LLC v. Dir., OWCP, 719 F.3d 1275, 1280 (11th Cir. 2013).

[9] *See generally* 30 U.S.C. § 932(l).

halt when the Black Lung Benefits Revenue Act of 1981 made amendments that required new filings by families to show black lung was, in fact, the cause of death before benefits would be awarded, whereas it had been presumed.[10]

After passage of the Affordable Care Act in 2010, the show-cause standard of the Black Lung Benefits Act was finally amended, which had been in place since 1981. Circuit courts have split over what must be filed in order for patients to receive coal-related-health-defect benefits because of these amendments.[11] The Eleventh Circuit has continued to abide by a lower threshold in their most recent holdings that a family does not need to re-file for benefits or show evidence that pneumoconiosis is to blame for the death of the miner.[12] Third and Fourth Circuit decisions agree with this lower standard.[13] Meanwhile, the Sixth Circuit deviated by supporting a higher show-cause standard before benefits are awarded, which requires the family to either re-file for benefits, or show that the miner's death was a direct result of black lung.[14] The Sixth Circuit effectively creates an "Unavoidable Catch-22" because, "a surviving spouse must file a claim to show that he, or she, does not have to file a claim."[15]

Miners' families that seek benefits are facing even greater confusion over the different show-cause standards while regular citizens struggle to sign up and navigate the new Affordable Care Act's nationwide, online, healthcare exchange .[16] Rather than having multiple interpretations to the Affordable Care Act's §1556 amendment to 30 U.S.C. § 932(l) (the main provision of the Black Lung Benefits Act pertaining to filing for benefits), courts should adopt a bright line rule regarding benefits and the show-cause standard. At the very least, the Sixth Circuit should reconcile their

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[10] *See* Daniel N. Price, *Black Lung Benefits Revisions*, 45 SOCIAL SEC. BULLETIN 11, 26-28 (1982), *available at* http://ssa.gov/policy/docs/ssb/v45n11/v45n11p26.pdf.

[11] *See* Kimberly Robinson, *Res Judicata No Bar to Repeat Claim For Black-Lung Survivor Benefits*, 82 U.S.L.W. 226 (U.S. Aug.13, 2013),.

[12] *See U.S. Steel Mining*, 719 F.3d at 1284

[13] *See* B & G Constr. Co., Inc. v. Dir., OWCP, 662 F.3d 233, 263 (3d Cir. 2011); W. Va. CWP Fund v. Stacy, 671 F.3d 378, 391 (4th Cir. 2011).

[14] *See* Vision Processing, LLC v. Groves, 705 F.3d 551, 559 (6th Cir. 2013).

[15] *See* Kimberly Robinson, *No Need to Show Cause of Death to Get Benefits, Eleventh Circuit Says*, 82 U.S.L.W. 23 (U.S. July 7, 2013) (bracketed material omitted),.

[16] *See* Nick Bilton, *In Debut, Affordable Care Web Site Gets Off to Rocky Start*, N.Y. TIMES (Oct. 1, 2013, 1:25 PM), http://www.nytimes.com/news/affordable-care-act/2013/10/01/in-debut-affordable-care-web-site-baffles-many-users/?_r=0.

conflicting ruling with that of the other circuits, which allows miners' families to obtain benefits without frivolous claims filings

Part I defines and contextualizes the show-cause order. Part II outlines the legislative history and old presumptions surrounding show-cause claims. Part III explains how the Affordable Care Act changed these claims. Part IV breaks down varying circuit interpretations to the Affordable Care Act's amendment to these claims. Part V explains the consequences of the Sixth Circuit's unusually high standard of proof. Part VI emphasizes the confusion that the circuit split has brought, especially in interpretations by the Department of Labor. Part VII examines the problem with fraud under these battling interpretations. Part VIII wrestles with the catch-22 situation that results from the interpretational ambiguity. Finally, Part IX concludes by suggesting that the Sixth Circuit may be forced to change their interpretation in light of compelling amendments and a changing legal tide in favor of miners.

I. SHOW-CAUSE

As defined by Black's Law Dictionary, a "show-cause order" is "[a]n order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not . . . grant some relief." [17] In black lung cases, this would be the requirement of miners and their families to prove that death or debilitation resulted directly from the black lung contracted while working with the coal industry rather than black lung being a mere contributing factor or unrelated side effect.[18] This burden can be particularly difficult to overcome for families requiring medical proof that the disease was the cause of the miner's death. Under a circuit that requires a heightened show-cause standard, like the Sixth Circuit, the inability to provide such proof may leave families without benefits entirely.

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[17] BLACK'S LAW DICTIONARY 1272 (10th ed. 2014).

[18] *See* Chris Hamby, *As Experts Recognize New Form of Black Lung, Coal Industry Follows Familiar Pattern of Denial*, CTR. FOR PUB. INTEGRITY (Nov. 12, 2013, 6:00 AM), http://www.publicintegrity.org/2013/11/01/13653/experts-recognize-new-form-black-lung-coal-industry-follows-familiar-pattern-denial.

In order to relieve this burden, Congress has attempted to amend the language of the Black Lung Benefits Act. Despite their attempts, the outdated language of the Act remains confusing, causing decisions to be left up to the courts. Faced with a potential onslaught of claims and regulations, coal companies are fighting hard through litigation battles and disputes over emerging scientific studies relating to coal and black lung to prevent a lower show-cause standard from being upheld .[19] Coal companies are willing to hire the best lawyers and prolong the process at all costs in order to avert huge payouts. This tactic is aimed not only at the pending awards, but future causes of actions before they even get started. Debbie Wells, a black lung coordinator at Valley Heath Systems in Cedar Grove, West Virginia, sees this all too often, claiming, "[coal companies] pretty much fight every claim as long and as hard as they can fight it. They appeal it to every level in fighting miners for their benefits." [20]

Interpreting the law has become a guessing game, which depends on the circuit and the show-cause standard to be used. With the Third, Fourth, and Eleventh Circuits no longer requiring the miners and their families to show a heightened standard of cause by the miners and their families by shifting the burden to the coal companies in their appeals, the Sixth Circuit—located in the heart of coal country—has taken a different tone by still holding the burden on the miner. Through its recent ruling in *Vision Processing, LLC v. Groves*, the Sixth Circuit held that families must reach the higher show-cause standard of proving pneumoconiosis to be the actual cause of death.[21] A show-cause "showdown" emerges from court judgments as the coal industry, special interests, and politics lurk in the background.[22]

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[19] *Id.*

[20] *Id.*

[21] Vision Processing, LLC v. Groves, 705 F.3d 551, 559 (6th Cir. 2013).

[22] *See* Dave Jamieson, *Black Lung Disease: Life-Saving Rules, Technology Stymied By Politics, Experts Say*, HUFFINGTON POST (Aug.18, 2012, 1:07 PM), http://www.huffingtonpost.com/2012/08/18/black-lung-disease-politics_n_1799340.html.

II. LEGISLATIVE HISTORY

The recognition of black lung as an occupational and compensable disease originated with the Federal Coal Mine Health and Safety Act of 1969.[23] The purpose behind the legislation, found in the original language of the Act, is "to provide benefits . . . to the surviving dependents of miners whose death was due to pneumoconiosis."[24] The Federal government would be responsible for these payments until 1973, when the former miners' employers or state compensation schedules would become liable for paying out benefits.[25] While this legislation was helpful, the standard required to show that a miner's death was due to pneumoconiosis became a burden on families to prove that the miner died as a direct result of the disease.[26]

The original Act's language would be amended, for the first time, in 1972 to decrease this show-cause burden on families.[27] Miners and surviving families were no longer required to prove that death was a direct result of pneumoconiosis. Rather, benefits would now be extended to those "who are totally disabled due to pneumoconiosis" as well.[28] Benefits could now be based on both death and disability, dramatically increasing the number of potential beneficiaries that could make a claim under the show-cause standards.

By 1978 further problems arose under the original language still found in the Coal Mine Health and Safety Act, requiring Congress to again make amendments to increase the availability of benefits.[29] Children, parents, and siblings were now all included in the group entitled to a deceased miner's benefits that were previously unobtainable under the old language of the

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[23] Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 742, 792 (1969) (codified as amended at 30 U.S.C. § 901(a) (2011)); U.S. Steel Mining Co., LLC v. Dir., OWCP, 719 F.3d 1275 (11th Cir. 2013).

[24] *U.S. Steel Mining*, 719 F.3d at 1277 (internal citations omitted) (quoting from § 401, 83 Stat. at 792).

[25] Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 422, 83 Stat. 796 (codified as amended at 30 U.S.C. § 932(c) (2011)).

[26] John S. Lopatto, III, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 684 (1982).

[27] 30 U.S.C. § 921 (2011).

[28] Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 792 (codified as amended at 30 U.S.C. § 901(a) (2011)).

[29] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 3(b)(1), 92 Stat. 95, 96 (1978) (codified as amended at 30 U.S.C. § 922(a)(3), (5) (2011)).

Act.[30] Congress took these amendments one step further by including a clause stating, "In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his or her death be required to file a new claim for benefits, or re-file or otherwise revalidate the claim of such miner."[31] This statement would prove to be the key language shaping the circuit split in the years to come.

The amendments passed in 1972 and 1978 went a long way in streamlining the process for beneficiaries to receive miner benefits in the years following their death. However, an abrupt change came when Congress revamped the show-cause process with the Black Lung Benefits Revenue Act of 1981.[32] The latest amendment once again required claims that were made after the effective date of this amendment to be re-filed with proof that the death was a result of pneumoconiosis adding to the clause, "except with respect to a claim filed under this part on or after [January 1, 1982]."[33] This simple modification would impact countless families.[34]

While legislative tinkering was relatively constant in the years between the first legislation's passage in 1969 and the amendments made in 1981, Congress would leave the Black Lungs Benefits Revenue Act of 1981 in place without change until 2010, when the Patient Protection and Affordable Care Act was introduced by the Obama administration.

III. PATIENT PROTECTION AND AFFORDABLE CARE (ACA) CHANGES

The introduction of the Patient Protection and Affordable Care Act, often referred to as the Affordable Care Act (ACA) or Obamacare, brought welcomed relief to many people. Most courts interpreted the ACA's §1556 amendment to the Black Lung Benefits Revenue Act to require a lower show-cause standard in obtaining benefits. The introduction of the

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[30] *Id.*

[31] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(h), 92 Stat. 95, 100 (1978) (codified as amended at 30 U.S.C. § 932(l)).

[32] Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 203(a)(6), 95 Stat. 1635, 1644 (1981) (codified as amended at 30 U.S.C. § 932(l)).

[33] *Id.*

[34] *See generally* Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 203(a)(4), 95 Stat. 1635, 1644 (1981) (codified as amended at 30 U.S.C. § 901(a)).

§1556(a) amendment through the Affordable Care Act allowed the fifteen-year, rebuttable presumption of black lung to apply in the claims of both miners and their families.[35]

The §1556(b) amendment to the Act specifically changed the language of 30 U.S.C. §932(l) to read, "In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." [36] This modification allows beneficiaries to receive benefits without making subsequent filings if they are deemed to be an "eligible survivor" and the miner was receiving benefits upon his or her death.[37] More importantly, the §1556(c) amendment was intended to clarify the timetable for benefit claims by inserting language that extended coverage over all claims filed after January 1, 2005 that were still pending at the time the Act was enacted on March 23, 2010.[38] While these changes appear to make a previously confusing process much easier, this is far from what has been the reality, as other aspects of the Black Lung Benefits Act, including §§921 and 922, were left unchanged. Of greatest concern for families seeking benefits, §921 was left to read:

> The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or, except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981, who at the time of his death was totally disabled by pneumoconiosis. [39]

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[35] Vision Processing, LLC v. Groves, 705 F.3d 551, 554-55 (6th Cir. 2013).
[36] 30 U.S.C. § 932(l) (2014).
[37] *Id.*
[38] *Vision Processing*, 705 F.3d at 555.
[39] 30 U.S.C. § 921(a) (2014).

This section requires that proof of pneumoconiosis must be present in a miner, resulting in the filing of new claims, despite the latest §1556 amendment. Therefore, claims have been awarded and denied depending on the circuit court handling the filing and the court's interpretation of the older language in conjunction with this latest amendment.[40]

IV. SHOW-CAUSE SPLIT

The Affordable Care Act in 2010 and the amendments to the Black Lung Benefits Act brought new claims in coal mining cities, such as Sophia, West Virginia, were soon to follow as families sought protection for miner benefits.[41] Clinics with procedural counselors for miners and their families formed as a tool to help communities struggling to navigate the complex benefits system.[42] Adding to the mix of new filings were the thousands of claims that had yet to be settled after sitting in years of limbo waiting for a diagnosis; some miners, like Ted Latusek of Cameron, West Virginia, waited over nineteen years for a claim to be properly handled by the courts.[43] In the midst of all this, the Third, Fourth, and Eleventh Circuits have taken on these new claims with a view that no proof is needed based on the lower show-cause standard to award benefits. The Sixth Circuit took another approach by upholding the heightened show-cause standard in the older version of the Black Lung Benefits Act of 1981.

The first case among the circuit split interpreting the latest amendment under the Affordable Care Act was handed down in the Third Circuit. In *B & G Const. Co., Inc. v. Dir., Office of Workers' Comp. Programs*, the Circuit provided the first reading of the conflict between the §1556 amendment to §932(l) and older provisions of the Black Lung Act in §921 and §922.[44] The opinion read, "Where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of

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[40] Kimberly Robinson, *No Need to Show Cause of Death to Get Benefits, Eleventh Circuit Says*, 82 U.S.L.W. 23 (U.S. July 7, 2013),.

[41] C.V. Moore, *Program to Help Miners File for Black Lung Benefits*, BECKLEY REGISTER-HERALD (May 29, 2013, 12:18 AM), http://www.register-herald.com/local/x1543056467/Program-to-help-miners-file-for-black-lung-benefits.

[42] *Id.*

[43] Hamby, *supra* note 18.

[44] B & G Const. Co., Inc. v. Dir., OWCP, 662 F.3d 233 (3rd Cir. 2011).

the earlier one and is clearly intended as a substitute a court may find that the later statute implicitly repeals provisions of the earlier one."[45] The precedent laid down contradictory limiting language of §921 and §922, that would still require showing of proof before awarding benefits, should not be read to overrule the new language of §932(l), which is overriding in the eyes of the court since it is last in time.[46]

While the Third Circuit decided this precedent, the Fourth Circuit provided its own interpretation simultaneously in its decision of *W. Virginia CWP Fund v. Stacy*. The Fourth Circuit took on a similar challenge by the Coal workers' pneumoconiosis compensation fund after the benefits review board awarded a widow her benefits without a new filing.[47] This ruling reiterated the Third Circuit's view that the new language of §932(l) no longer requires what the language of other sections in the Black Lung Act once did. The Court let it be known, "To the extent that §§ 901, 921(a), and 922(a)(2) require such a survivor to prove that pneumoconiosis caused the miner's death in order to receive benefits, §932(l) —as the most recent amendment to the BLBA—"overrides the conflicting language."[48]

U.S. Steel Min. Co., LLC v. Dir., OWCP is the most recent precedent, where the Eleventh Circuit held that beneficiaries did not have to prove that their family member died of black lung or re-file for benefits with an additional claim, as long as they met relational qualifications.[49] Like many cases involving a benefits battle, this case had the employer of a deceased minor seeking to uphold the lower court's ruling that proof was required to show pneumoconiosis was the official cause of death.[50] The Eleventh Circuit recognized other provisions of the Black Lung Act. Specifically, §§921 and 922 of the Act were left untouched with the §1556 amendment to §932(l) under the Affordable Care Act. However, the court concluded that when it comes down to the two interpretations, §932(l) governs as last in time because in "[d]oing so, we conclude that the term 'eligible survivors' requires that survivors meet certain relational and dependency definitions,

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[45] *Id.*
[46] 30 U.S.C. §§ 921, 922 (2013).
[47] W. Va. CWP Fund v. Stacy, 671 F.3d 378, 391 (4th Cir. 2011).
[48] *Id.*
[49] U.S. Steel Min. Co., LLC v. Dir., OWCP, 719 F.3d 1275, 1283 (11th Cir. 2013).
[50] *Id.* at 1279.

as established by Congress and the Secretary of Labor, but not that survivors must show that a miner died due to pneumoconiosis or that a miner was totally disabled by pneumoconiosis when he died."[51] The Eleventh Circuit found no resulting due process violation by applying this language to a claim filed before the effective date of the Patient Protection and Affordable Care Act of March 23, 2010.[52]

These circuits interpreted the new language of §932(l) to override the old language contained in the Black Lung Act. Meanwhile, the Sixth Circuit developed a different interpretation based on its ruling in *Vision Processing, LLC v. Groves*.[53] This opinion is noteworthy because of the special attention given to the circuit split when reconciling the old language with that of the new language:

> While Congress would have been wise to make corresponding changes to the other more general provisions, the omission does not create irreconcilability but merely leaves in place additional language that serves no useful purpose (except as a reminder of the old rules). The fact remains that survivor benefits are paid to the survivors of miners who die due to pneumoconiosis, and the post–2010 amendments simply resurrect a former method for making this showing. Our job is to reconcile provisions when a fair reading permits, and that is just so here.[54]

Due to this ruling, the miners' families are still required to show proof that pneumoconiosis was the cause of the death for the miner.[55] In interpreting §932(l), the Sixth Circuit applies the older language to claims filed after the January 1, 2005 date or to those claims still pending on March 23, 2010, unlike the other circuits. In an attempt to reconcile both the new language of the §1556 amendments and the old language of §921

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[51] *Id.* at 1283.
[52] *Id.* at 1286.
[53] Vision Processing, LLC v. Groves, 705 F.3d 551, 559 (6th Cir. 2013).
[54] *Id.*
[55] *Id.*

and §922, the Sixth Circuit cemented its split from other circuits in the ruling requiring pneumoconiosis to be shown as the cause of death.[56]

V. SIXTH CIRCUIT IMPACT ON MINERS

Due to the Sixth Circuit adoption of a different show-cause standard for awarding benefits, mining families are now far more concerned with other issues, besides benefits, as these families for years have relied upon the rulings of other circuits to protect miners.[57] First and foremost, beneficiaries in certain circuits have a legitimate chance of being awarded black lung claims without requiring pneumoconiosis to be the cause of death, while those in the Sixth Circuit are facing an uphill battle in establishing benefits based on health status.[58] Dr. Donald Rasmussen of the Department of Labor, who screens potential black lung cases, admits that the screening process is alarming, as it undoubtedly always include appeals.[59] Dr. Rasmussen warns that "[i]t takes a long time to succeed," and that even so, "a miner is not assured of winning anyway."[60]

Since coal companies fall within various circuit jurisdictions, each having different show-cause standards, there may be attempts to forum shop away from courts, like the Fourth Circuit, who recently ruled that coal companies and the doctors they employ to dispute miners' claims were not guilty of fraud despite the positive pathology reports of miners being withheld.[61] Furthermore, allowing there to be different show-cause standards between jurisdictions, instead of having one uniform standard, is a headache for any family seeking to file a claim. The time and effort required to file a black lung claim is complicated enough without the added task of having to navigate a circuit court split for plaintiffs.[62] It should be

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[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] Brenda Wilson, *Black Lung Compensation an Uphill Battle for Miners*, NPR (Apr. 27, 2010, 4:15 PM), http://www.npr.org/templates/story/story.php?storyId=126303910.

[60] *Id.*

[61] Ken Ward Jr., *4th Circuit Sides with Coal Firm in Black Lung Case*, THE CHARLESTON GAZETTE (Jan. 3, 2014), http://www.wvgazette.com/News/201401030032.

[62] Brian L. Hager, *Is There Light at the End of the Tunnel? Balancing Finality and Accuracy for Federal Black Lung Benefits Awards*, 60 WASH. & LEE L. REV. 1561, 1580 (2003).

noted that in order to receive benefits, miners must first file with the Department of Labor and this process can take up to seven years due to paperwork, hearings, and appeals.[63] The Department of Labor's website adopts the language of 30 U.S.C. §932(l) as its mission statement, and it embodies the consensus of the Third, Fourth, and Eleventh Circuits in seeking to help families with their burden:

> The mission of the Division of Coal Mine Workers' Compensation, or Federal Black Lung Program, is to administer claims filed under the Black Lung Benefits Act. The Act provides compensation to coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and to survivors of coal miners whose deaths are attributable to the disease. The Act also provides eligible miners with medical coverage for the treatment of lung diseases related to pneumoconiosis.[64]

The judicial interpretation by the various circuits is not only felt at the individual miner's level, because benefits are not awarded and livelihoods are lost. The judicial interpretation impacts communities as a whole. Studies have shown that if the coal industry disappeared in states like Kentucky, communities would be more likely to live in poverty, with dependence on social welfare.[65] Even with the coal industry's presence, miners unable to work because of black lung are virtually unemployed for life as the miners lack financial benefits and face an uphill battle of processing claims. These miners are left to file basic unemployment benefits when they lack resources to meet the heightened show-cause standards of black lung claims. Many coalminers, especially those in Eastern Kentucky, know no other trade or source of income to prevent dependence on unemployment since mining has been a generational occupation.

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[63] Wilson, *supra* note 59.

[64] *Div. of Coal Mine Workers Compensation (DCMWC)*, Office of Workers' Comp. Programs, U.S. DEP'T OF LABOR, http://www.dol.gov/owcp/dcmwc (last visited Mar. 30, 2015).

[65] *See* Jonathan M. Roenker, *The Economic Impact of Coal in Appalachian Kentucky*, U. OF KY. CENTER FOR BUS. AND ECON. RES., *available at* http://cber.uky.edu/Downloads/Roenker02.htm.

Miners in the Sixth Circuit are likely to be the hardest hit by the courts' decision affecting their lost benefits because they live in one of the poorest regions of the country.[66] Eastern Kentucky counties stand to lose the most from these court decisions since their local economies are built entirely around the coal industry. This region has felt the effect of unemployment due to recent layoffs from coalmines shutting down.[67] Contained within this region is the single poorest county in the entire United States, Owsley County, Kentucky, with a median household income so low that 41.5% of residents fall below the poverty line.[68] Without a Sixth Circuit change in interpretation and a streamlined approach to claims, the Kentucky economy and the region as a whole will become like those of the ten poorest counties of the state.[69] It is now time for the Sixth Circuit to move forward for the sake of miners and beneficiaries, as well as the affected communities, by aligning with the Third, Fourth, and Eleventh Circuit approach.

VI. GROWING CONFUSION

These court decisions interpreting the §1556 amendments provide the battleground in the showdown among the split circuits. Prior to the Sixth Circuit decision and the fallout resulting from the circuit split, the Supreme Court had denied certiorari in a Fourth Circuit appeal made by the Pneumoconiosis Fund over the award given to the Stacy's spouse, as seen in *W. Virginia CWP Fund v. Stacy*.[70] With the subsequent split among the circuits, the Supreme Court should grant certiorari for any further appeals that may be brought to provide clear guidance on interpreting the §1556 amendments that affect §932(l).

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[66] *Appalachia's Economy*, APPALACHIAN REG'L COMM'N, http://www.arc.gov/appalachian_region/AppalachiasEconomy.asp, (last visited Mar. 30, 2015).

[67] See Tanner Hasterberg, *Ten Eastern Kentucky Counties Lead State in Unemployment*, WYMT MOUNTAIN NEWS (Dec. 27, 2013, 12:35 AM), http://www.wkyt.com/wymt/home/headlines/Ten-Eastern-Kentucky-counties-lead-state-in-unemployment-237453011.html.

[68] *America's Poorest County: Proud Appalachians Who Live Without Running Water or Power in Region Where 40% Fall Below the Poverty Line*, UK MAIL ONLINE (Apr. 24, 2012, 2:45 PM), http://www.dailymail.co.uk/news/article-2134196/Pictured-The-modern-day-poverty-Kentucky-people-live-running-water-electricity.html.

[69] *See generally id.*

[70] *See* W. Va. CWP Fund v. Stacy, 671 F.3d 378, 391 (4th Cir. 2011).

Along these lines, seeking outside interpretation from the Department of Labor's website, "Compliance Guide to the Black Lung Benefit's Act," results in confusion.[71] It was last updated in 2001 to reflect the language of the 1981 Black Lung Act itself, rather than any of the new language found in 2010's version.[72] In the brief history of black lung legislation and a recent split in the courts, there are few resources obtainable for miners and their families to find direction in the filing process for benefits, including the appeals process that is still plagued in backlog. However, on the same Department of Labor website, a press release was given in 2012 championing the amendments to the Black Lung Act and the language known as the Byrd Amendments that attempt to rectify the inconsistency between §932(l) and §§921, 922.[73] The director of the Office of Worker's Compensation, Gary Steinberg, was quoted as saying, "The late Sen. Robert Byrd championed these vital provisions, and our proposed rules implementing them would have a dramatic impact on families who have proudly spent their lives working in the mining industry."[74] A clear decision by the courts would lend itself to helping the miner far more than a brief paragraph on the Department of Labor's website that attempts to clarify a confusing contradiction.

Despite these setbacks and the confusion of the Department of Labor's procedures, there may be hope in a final ruling published in the Federal Registrar. The Department of Labor's Office of Workers' Compensation Program (OWCP) gave some guidance in this ruling regarding the §1556 amendments made to the Black Lung Benefits Act.[75] This final ruling provides literature on how these amendments should be properly

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[71] *See* generally *Compliance Guide to the Black Lung Act*, Division of Coal Mine Workers' Compensation, U.S. DEP'T OF LABOR (Jan. 2001), http://www.dol.gov/owcp/dcmwc/regs/compliance/blbenact.htm.

[72] *Id.*

[73] Press Release, U.S. DEP'T OF LABOR, US Labor Department Announced Proposed Rules Implementing Amendments to the Black Lung Benefits Act from the Patient Protection And Affordable Care Act, (April 2, 2012), *available at* http://www.dol.gov/opa/media/press/OWCP/OWCP20120624.htm.

[74] *Id.*

[75] *Id.*

implemented and interpreted.[76] The two provisions of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(l) that were taken away by the 1981 amendments to the Black Lung Benefits Act will now apply under section §1556 of the Affordable Care Act.[77] Senator Robert Byrd of West Virginia, who was a supporter of the miner and their benefits, sponsored these amendments prior to his death, which became known as the "Byrd Amendments."[78] The director of the Department of Labor's OWCP proclaimed, "[m]any miners disabled by black lung disease and their survivors will receive critical benefits as a result of the Byrd Amendments."[79] Nonetheless, the courts must work together in finding a way to interpret and implement the §1556 amendments to the Black Lung Benefits Act appropriately across the circuits.

VII. FRAUD ON BOTH SIDES

Under the framework of the Affordable Care Act and with the Byrd Amendments in place, it could be argued that the Sixth Circuit has been interpreting the law incorrectly, compared to the other circuits, in requiring proof of pneumoconiosis prior to awarding benefits. Those who support the Sixth Circuit's interpretation will vehemently argue against that idea and propose that it saves the coal companies and states millions from reduced payments being awarded.

Sixth Circuit precedent proponents may believe a higher show-cause standard is beneficial in cutting down on fraudulent claims by those filing for benefits without need. In order to fend off these claims, the Department of Labor's "Black Lung Benefits Act Fraud" has been established.[80] While there are many miners legitimately suffering the debilitating effects of black

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[76] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 77 Fed. Reg. 62,19456 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. pt. 718, 725).

[77] Press Release, The Exponent Telegram, U.S. Dep't of Labor Publishes Final Rule Implementing Byrd Amendments to Black Lung Benefits Act (Sept. 25, 2013), *available at* http://www.theet.com/news/press_releases/u-s-department-of-labor-publishes-final-rule-implementing-byrd/article_b0d5a8ac-25f6-11e3-9d11-0019bb2963f4.html.

[78] *Id.*

[79] *Id.*

[80] *Glossary of Terms*, Office of Inspector Gen., U.S. DEP'T OF LABOR, http://www.oig.dol.gov/hotlineterms.htm#blacklung (last visited Feb. 17, 2015).

lung through pneumoconiosis, others are abusing the claims process in order to unduly benefit from the system.

Under state black lung laws, Kentucky experienced a fraudulent claims problem until 1996, when Governor Paul Patton signed tighter legislation into law, saving the state nearly $136 million in workers' compensation insurance.[81] Coal companies and state officials alike championed the new law. Walter Turner, commissioner of the State Department of Workers' Claims described the problem by saying, "[t]he old law was too generous and compensated some miners who weren't actually disabled."[82] While the Sixth Circuit can hardly use this crackdown as a reason for denying benefits to miners and their families, legitimately in need of aid because of black lung, delays in claims and a renewed requirement of pneumoconiosis to be shown may have a limiting effect on these fraudulent claims that were previously passing through without scrutiny.

Those opposed to the Sixth Circuit's heightened show-cause standard look to coal companies and doctors as the only winners in a corrupt game, now impossible to win. It is a presumption that all claims that come before the courts, and the litigation strategies used by coal companies, are ethical and without deceit. This has not been shown to always be the case.

Congressman have been advocating for strict reviews by the Inspector General of the Department of Labor because of the policies and practices of coal companies and the doctors they seek when benefit disputes arise.[83] Representatives George Miller (D-Calif.) and Joe Courtney (D-Conn.) were quoted in a letter saying, "I look forward to learning the results of your investigation as I work with my colleagues to assess legislative reforms to prevent the benefits claims process from being gamed by coal companies, their lawyers, and their doctors."[84]

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[81] R.G. Dunlop & Gardiner Harris, *Few Miners Now Qualify for Benefits: Kentucky's Law's Black-lung Test Harder to Pass*, COURIER-JOURNAL (Apr. 25, 1998), http://www.courier-journal.com/cjextra/dust/frame_compensation_benefits.html.

[82] *Id.*

[83] Chris Hambly et al., *Congressmen Call for Federal Investigation of Black Lung Benefits Program, Citing Center-ABC Reports*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2013/11/07/13695/congressmen-call-federal-investigation-black-lung-benefits-program-citing-center.

[84] *Id.*

There are many reports that have surfaced claiming doctors and medical centers, including world-renowned Johns Hopkins Medical Center, are withholding evidence and intentionally limiting the diagnosis of black lung to deny benefits for miners.[85] If coal companies are intentionally interfering with the benefits process through litigation tactics and withholding evidence, there may be a much larger problem at play than simply putting the blame on the courts' interpretations of the latest amendments. Senator Jay Rockefeller of coal-invested West Virginia has lent his support to investigating the process that is depriving miners of their benefits.[86] When asked his thoughts on the dark side to miners benefits, the Senator responded, "[t]he deck is stacked in theory and in practice against coal miners, men and women, and it is tragic."[87] This call for a renewed investigative effort by the Inspector General is all part of a larger investigation recently conducted into the Black Lung Act where the doctors and lawyers presumably control the process. In this investigation, ABC News exposed a startling fact coming out of the John's Hopkins Medical Center that Dr. Paul Wheeler, head of the Hopkins X-ray unit, has not found a single case of black lung in over 1,500 cases that were submitted for his review since 2000.[88]

If fraudulent claims, or the defense tactics used, occur on a large scale across the Sixth Circuit and beyond, courts may not be to blame when ruling on the facts presented by each party. Yet at the same time, the Sixth Circuit could not help but take the course of Third, Fourth, and Eleventh Circuits, which no longer requires the higher show-cause standard of pneumoconiosis for miners to obtain benefits. Moving away from this heightened show-cause standard may avert potential fraud that arises when doctors and medical centers require proof. Families of miners would be awarded benefits based on the presumption included in the latest Byrd

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[85] Brian Ross et al., *For Top-Ranked Hospital, Tough Questions About Black Lung and Money*, ABC WORLD NEWS (Oct. 30, 2013), http://abcnews.go.com/Blotter/investigation-johns-hopkins-tough-questions-black-lung-money/story?id=20721430.

[86] *Id.*

[87] *Id.*

[88] Matthew Mosk, *Investigative Unit 2013: Miners denied Black Lung Benefits*, ABC WORLD NEWS (Dec. 26, 2013), http://abcnews.go.com/Blotter/investigative-unit-2013-miners-denied-black-lung-benefits/story?id=21338315.

Amendments, rather than facing an unwinnable battle.[89] The potential claims filed by those ineligible for black lung benefits surely do not outweigh the concern for those miners being unjustifiably denied compensation in their pursuit of obtaining rightly earned benefits. The Sixth Circuit's alignment with the other circuits and their interpretation of the law would avoid this dilemma.

XIII. "CATCH-22"

The Eleventh Circuit avoided a "catch-22" when *U.S. Steel Min. Co., LLC v. Dir., OWCP* was decided in favor of the beneficiaries, rather than heeding the argument of the U.S. Steel company that would have enabled the "catch-22" to exist.[90] U.S. Steel acknowledges in the appeal that benefits can be awarded to spouses of miners that were in receipt of benefits before their death without filing a new claim, while acknowledging a new claim would nonetheless be required to prove pneumoconiosis in order for these benefits to continue in the future.[91] This may sound reasonable, but when these requirements are viewed together, a spouse would need to file a claim to prove that she could still have medical "eligibility" to these benefits. Writing for the Eleventh Circuit, Judge Cox described U.S. Steel's argument saying, "a surviving spouse must somehow show that the miner died due to pneumoconiosis—which, it seems, would require a new claim. The absurd result: A surviving spouse must file a claim to show that he or she does not have to file a claim."[92] He went on to say, "[w]e fail to see how this 'administrative filing' would be meaningfully distinct from a 'claim' that a surviving spouse had to file before March 23, 2010."[93] The importance of this Eleventh Circuit opinion, which parallels the interpretation of the Third and Fourth Circuits, is not only the avoidance of a frivolous administrative filing, but also demonstrates the error of the Sixth Circuit

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[89] Determining Coal Miners' and Survivors' Entitlement to Benefits, 77 Fed. Reg. 19,456 (Mar. 30, 2012) (to be codified at 20 C.F.R. pt. 718).

[90] Michael Scott Leonard, *Circuits Reaching Consensus on Meaning of Amendments to Black-Lung Law: U.S. Steel Mining Co. v. Director, OWCP*, 28 WESTLAW J. EMP. 12, Aug. 14, 2013, at 1, 1.

[91] *Id.*

[92] U.S. Steel Min. Co. v. Dir., OWCP, 719 F.3d 1275, 1281-82 (11th Cir. 2013).

[93] *Id.* at 1282.

only months earlier when it required the cause of pneumoconiosis to be shown under its interpretation in *Vision Processing, LLC v. Groves.*[94]

The Sixth Circuit interprets the language of latest amendments of the Affordable Care Act to the Black Lung Benefits Act in the same light as the U.S. Steel Company did in their argument before the Eleventh Circuit. The Sixth Circuit looked at the language as requiring proof of pneumoconiosis, while acknowledging that the surviving spouse is entitled to the miner's benefits. In the opinion of the Sixth Circuit, Judge Sutton wrote:

> While Congress would have been wise to make corresponding changes to the other more general provisions, the omission does not create irreconcilability but merely leaves in place additional language that serves no useful purpose (except as a reminder of the old rules). The fact remains that survivor benefits are paid to the survivors of miners who die due to pneumoconiosis, and the post–2010 amendments simply resurrect a former method for making this showing.[95]

The simple addition of this language is the mistake made by the Sixth Circuit. In their opinion, it has caused a split to occur, and has made the benefits process more complicated. The rationale for this decision is contained in a well-known precedent: *FDA v. Brown & Williamson Tobacco Corp.*[96] In that case, the court opined, "a court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole."[97] Although this precedent is well known, it may have been applied incorrectly, as a means to justify its interpretation.

Fellow courts have stated differing opinions on this issue, which should signal that the Sixth Circuit erred in its analysis of the language. For the most part, the opinion in *Vision Processing, LLC v. Groves* lines up with

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[94] Vision Processing, LLC v. Groves, 705 F.3d 551, 559 (6th Cir. 2013).
[95] *Id.*
[96] See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[97] *Id.* at 133.

other circuits, despite the area of confusion around the additional filing that leads to a "catch-22."[98] This single area has shown itself to be a vital part of the opinion, but if actions were taken now it would be reconcilable for the Sixth Circuit moving forward.

The goal of the Affordable Care Act's §1556 amendment to the Black Lung Benefits Act was to create an overall easier process for obtaining benefits, not a harder one. The presumption is based on the miners' fifteen years of work in the mines by shifting the burden families have faced since 1981, to the employers. This rebuttable presumption finally put the families on an even playing field with the potentially corrupt litigation schemes often employed by coal companies through concealing evidence, and influencing doctors' decisions.[99] By shifting this burden to the coal companies, and actually requiring proof that black lung does not exist, the original goal of providing greater benefits to families would be achieved. The Sixth Circuit's decision stunts these advancements toward reform and accessibility to benefits. Further, it places the burden back on the families to file a new claim, despite being already "eligible" under previous interpretations of the law recognized by the Sixth Circuit itself. Judge Cox made it clear in the Eleventh Circuit's opinion that the goal should be to make things easier, not harder, in reconciling the language of §932(l) with the older language.[100] Judge Cox wrote, "[w]e therefore agree with the conclusion of the Benefits Review Board to the extent that it concluded that survivors who meet the requirements of §932(*l*) are not subject to language in §922(a)."[101] This decision and rationale used by the Eleventh Circuit should be a guidepost for the Sixth Circuit to follow in interpreting the law, rather than a mere consideration of persuasive precedent by a fellow circuit.

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[98] Leonard, *supra* note 90, at 3.

[99] Ken Ward Jr., *Miners Say Upper Big Branch Mine Cheated on Dust Sampling*, THE CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2012/07/08/9318/miners-say-upper-big-branch-mine-cheated-dust-sampling.

[100] *U.S. Steel Min. Co.*, 719 F.3d at 1284.

[101] *Id.*

IX. PROPOSED RECONCILIATION

While the Sixth Circuit has not overturned their ruling in *Vision Processing, LLC v. Groves*, the inevitable change may be coming from outside forces. As the Byrd Amendment enters into law, and additional proposed legislation lingers in the Congressional approval process, the Sixth Circuit may be forced to take up an appeal concerning black lung benefits once the new language of these laws comes to fruition.[102] The Sixth Circuit would no longer be able to interpret §932(l) in their supposed understanding with the older language of §921 and §922, which requires additional proof that pneumoconiosis was the miner's cause of death. Such a move by lawmakers, which forces the hand of the Sixth Circuit, would help provide benefits to those most recently denied access, while simultaneously extinguishing the split interpretations of the law amongst the circuits. Once again, this requires lawmakers to move forward and pass the latest legislation proposed by Senator Rockefeller of West Virginia,[103] which would provide the needed support and structure for miner's benefits, while in the midst of a "do-nothing" Congress of gridlock.[104] As Judge Cox concluded in the Eleventh Circuit's opinion, "[c]onceivably, Congress amended Section §932(l) to lighten the burden on survivors seeking to receive the benefits their associated miners had already been awarded."[105] The Sixth Circuit should move forward at all costs, and make sure that the goal to protect and preserve the benefits of miners who face the inherent dangers of pneumoconiosis is embodied in their future decisions.

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[102] Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits, 78 Fed. Reg. 59,102, 59,103 (Sept. 23, 2013) (to be codified at 20 C.F.R. pt. 718, 725).

[103] S. 1416, 113th Cong. (2013).

[104] Michael Memoli, *A Do-nothing Congress' for the Record Books?*, L.A. TIMES, (Dec. 22, 2013), http://articles.latimes.com/2013/dec/22/nation/la-na-congress-inaction-20131223.

[105] *U.S. Steel Min. Co.*, 719 F.3d at 1287.